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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OPPOSING CERTIORARI.

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BRIEF OPPOSING CERTIORARI.

MAY IT PLEASE THE COURT:

I.

Opinion of Court Below.

The opinion of the Supreme Court of Illinois in this case was filed May 16, 1944, appears as *The People, ex rel*

Benefit Association of Railway Employees, et al. v. *Julius H. Miner, Judge, et al., Respondents,* 387 Ill. 393 and is set out in full in the record herein beginning at Pg. 91.

II.

Jurisdictional Grounds.

This is not a case of public importance. It does not involve a federal statute. There is no federal question presented nor was any one raised in apt time. There has been no denial of due process as petitioner Petersen has been heard all the time. This is merely a case where the Illinois Supreme Court followed the plain wording of an Illinois statute (Section 201 of Illinois Insurance Code, *infra* p. 4) and wherein petitioner Petersen has failed to not only exhaust but even pursue a plain administrative remedy provided by Illinois statutes. (Secs. 401, 402, 403, 407 of Illinois Insurance Code, *infra* p. 17.)

III.

Statement of the Case.

This is a petition for a writ of certiorari from a judgment of the Supreme Court of Illinois entered in an original proceeding there and awarding two original writs of *mandamus* to respondents herein. The first writ compels petitioner Miner, a Judge of the Circuit Court of Cook County, Illinois, a trial court of general jurisdiction, to expunge two orders entered by him in a certain case brought by petitioner Petersen against these respondents in said Circuit Court, the first order requiring respondents to file a list of documents therein and the second order overruling respondents' motion to dismiss said suit for want of jurisdiction (R. 99, 100). The first writ

also ordered the said Miner to sustain the motion to dismiss for want of jurisdiction and enter judgment that said cause be dismissed for want of jurisdiction and that Petersen take nothing by his suit and that the defendants therein, being the respondents here, go hence without day, etc. (R. 100). The second writ compels petitioner Petersen to appear in the Circuit Court and move, orally or in writing, to dismiss said suit with prejudice (R. 101, 102).

In the Circuit Court suit, Petersen alleges that he is the holder of a certificate of insurance under a group policy issued by the respondent, Benefit Association of Railway Employees, hereinafter referred to as the Association, and, on behalf of himself and others similarly situated, he seeks to maintain said suit. The statement of petitioners is substantially correct except that it fails to state that the action was brought against the respondent Association as well as its officers and directors. Likewise it fails to mention that the agency contract, which the suit seeks to have declared invalid, is the one by virtue of which the Association acquires all of its business (R. 11). Petitioners' statement also fails to state that out of the sums of money alleged to be received by the individual respondents, and set out so prominently on pg. 5 of the petition, must come "all expenses of securing business and of commissions to agents, and also to pay the compensation of the company's President, First Vice President and Second Vice President" (R. 11).

Thus, not only did Petersen's suit seek to remove the present officers and directors of the Association, not only did it seek to have such offices and directorships declared vacant, not only did it seek the ordering of a new election to fill such vacancies, and not only did it seek the direction that present officers and directors be declared ineligible for re-election, but it also sought to destroy as "wholly illegal

and void under the statutes of the State of Illinois'' (R. 12) the contract under which the Association acquires all of its business.

The sole question presented to the Supreme Court of Illinois, as we develop more fully hereafter, was whether such a suit, upon the facts pleaded in the complaint and admitted in the record, was one ''interfering with the prosecution of the business of any company'' and therefore proscribed by Section 201 of the Illinois Insurance Code (Ill. Rev. Stats. (1941) Chap. 73, Par. 813), except it be instituted ''upon the petition of the director (insurance) represented by the Attorney General''. Upon the facts pleaded in the complaint and admitted in the record, the Supreme Court of Illinois held that Petersen's suit was such an action, that the Circuit Court was without jurisdiction to entertain it because of the statute and that therefore its writs should issue (R. 93, 96, 98).

The pertinent provisions of the Illinois Statute which prohibited the maintenance of Petersen's suit, being Section 201 of the Illinois Insurance Code, were and are as follows (Ill. Rev. Stats. (1943) Chap. 73, Par. 813):

> ''No order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of any company, or for the appointment of a temporary or permanent receiver, rehabilitator or liquidator of a domestic company, or receiver or conservator of a foreign or alien company, shall be made or granted otherwise than upon the petition of the Director (of Insurance) represented by the Attorney General as provided in this article.''

IV.

ARGUMENT.

A.

No federal question is presented nor was one properly raised or in apt time.

We submit that not only is there no substantial federal question here, but also that none was raised properly or in apt time. This was an original proceeding in the Supreme Court of Illinois. In the briefs filed by them in that Court, petitioners here made no claim that the awarding of the writ would deny due process. Their Theory of the Case and their Points and Authorities in said brief contain not even an illusion to a federal question (R. 74-75). The cause was submitted by them upon pure local questions of statutory construction.

The first mention of any federal question came in our petition for rehearing after the first opinion of the Illinois Court (R. 84-88). We specifically raised it and argued it at some length. In their answer to that petition, their only reference to a federal question being asserted by them is the statement "it *could* well be said by respondent Petersen that the granting of a writ of mandamus" would be directly contrary to *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673 as it would deprive the stockholders of the corporation of their only remedy for an accounting (R. 89). After the rehearing was granted and a new opinion filed awarding the writ, petitioners filed a petition for rehearing. The

three grounds which they assigned as reasons for rehearing are the following (R. 104):

> (a) The controlling issues in this cause remove it entirely from the scope of Section 201 of the Insurance Code as it is not an action against an insurance company but, in reality, an action by an insurance company, and
>
> (b) That even if it be conceded that Petersen's is the type of suit which could fall within the scope of Section 201, the Court was under a misapprehension in concluding that the result of such suit, if favorable to Petersen, would produce an interference with the prosecution of the business of the petitioning insurance company, and
>
> (c) That respondent could obtain relief by application to the Director of Insurance.

Certainly there is no reference to a federal question here.

In the body of that petition for rehearing under their argument that Petersen's suit does not interfere with the prosecution of the business of the Company (R. 109) appears merely a sentence to the effect that a holding that the suit would interfere with the prosecution of the business of the Company "would be to deprive him (Petersen) of property without due process", citing *Brinkerhoff-Faris v. Hill*, 281 U. S. 673 (R. 114). Then follows in the concluding part of that petition for rehearing, the statement that "the determination in this *mandamus* proceeding, from the record before the trial court, that Petersen's suit would, as a *matter of fact*, interfere with the prosecution of that insurance business, deprives respondent Petersen of his day in court and thereby deprives him of property without due process of law" (R. 116). It is upon this record that petitioners claim the federal question was raised in apt time. Not only did the Illinois Court not decide any federal question but it could well ignore any pretended claim raised in this manner under the familiar rule that errors assigned but not argued are deemed

waived. The mere mention of a federal question *arguendo* on a point non-federal certainly should not be deemed to raise a federal question and the mere bald assertion of a denial of due process (R. 116) without a fair and adequate presentation does not compel a court to conduct an independent investigation of its own into the law to determine if it has merit where counsel apparently do not see fit to do so. (*Harding* v. *Illinois*, 196 U. S. 78, 87, 88; *Miles* v. *Caldwell*, 2 Wall. 35, 36; *Duggan* v. *Ryan*, 211 Ill. 133, 137.)

But even if it be assumed that this was sufficient to raise a federal question it came too late upon a petition for rehearing unless the State Court actually entertained the question and decided it. (*Herndon* v. *Georgia*, 295 U. S. 441, 443 and cases cited.) It is clear that the Illinois court did neither (R. 91, *et seq.*). This is admitted by petitioners (Pet. 25).

Petitioners seek to excuse their tardy conduct by claiming to be surprised by a change in state law, and thereby to avail themselves of the exception permitting the federal question to be raised by the petition for rehearing under the *rationale* that it is then being raised at the earliest opportunity (Pet. 24). They ignore the rule that "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relies, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this Court". (*Brandeis J.*, in *Brinkerhoff-Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 680, note 7 and cases cited.) We by no means infer that there was a change in state law. The opinion of the Illinois court indicates quite clearly, we submit, that the cases upon which petitioners relied were inapplicable (R. 95, 96) while other Illinois cases were controlling (R. 94, 96).

Only one question was presented to the State court and that was the substantial one of whether Petersen's suit was one interfering with the prosecution of the business of an insurance company upon the facts alleged in his complaint in the trial court and which were admitted to be true. He was fully heard on that question by the Illinois Supreme Court. At no time was he deprived of the right to present his case. Any claim of a change in state law could only refer to the question of whether Petersen was right or wrong about the state law and not to a denial of a right to be heard by virtue of the change in the state law as he was being heard fully all the time. It is this very fact that brings this case within the doctrine we have quoted from the *Brinkerhoff-Faris* case and differentiates the case at bar from the facts of that case in that the party there was precluded from his remedy before the State Tax Commission by virtue of the change in state law. As we have indicated, throughout this case Petersen has been heard fully on the question of whether his suit is within the prohibition of the Illinois Statute, and no change in state law has deprived him of such hearing.

B.

Petitioners were not denied due process.

We have heretofore set out the pertinent provisions of the statute prohibiting Petersen's suit (*ante* p. 4). Notwithstanding this statute petitioner Petersen filed a suit in the Circuit Court of Cook County (R. 9) and the trial judge, petitioner Miner, assumed jurisdiction over that suit, overruling respondents' motion to dismiss for want of jurisdiction (R. 27, 29) and entering an order therein requiring respondents to file a list of documents, etc. (R. 25, 26).

Thereupon, respondents moved the Supreme Court of Illinois for leave to file an original petition in *mandamus* (R. 1) seeking to exunge those orders and for writs requiring dismissal of said suit (R. 40, 41) because of lack of jurisdiction in the trial court to entertain it at the instance of one not the Director of Insurance of Illinois (R. 39), quite similar to the procedure followed in *Gibbes* v. *Zimmerman,* 290 U. S. 326, 331, except that respondents employed original *mandamus* instead of prohibition, the Supreme Court of Illinois having no jurisdiction to issue original writs of prohibition. (*People* v. *Circuit Court*, 347 Ill. 34, 40.) It is the practice of the Illinois Supreme Court to issue its original writ of *mandamus* to compel *nisi prius* courts to expunge orders, judgments or decrees entered without jurisdiction. (*People* v. *Niehaus*, 356 Ill. 104, 106, 112, 113, 114; *People* v. *Shurtleff*, 353 Ill. 248, 259, 264; *People* v. *Fisher*, 303 Ill. 430, 434.) Jurisdiction to issue original writs of *mandamus* is expressly conferred upon the Illinois Supreme Court by Article VI, Section 2 of the Illinois Constitution, which provides in part as follows:

> "The Supreme Court shall consist of seven judges and shall have original jurisdiction in cases relating to the revenue, in *mandamus* or *habeas corpus* and appellate jurisdiction in other cases."

Respondents' motion for leave to file the petition was granted by the Illinois Supreme Court and petitions were ordered to answer the petition for the writ (R. 45). This they did by instruments denominated answers (R. 47, 50).

The "answer" of Petersen disclosed a complete lack of understanding of the Illinois practice in original *mandamus* seeking as it did to raise both issues of law and issues of fact (R. 50, *et seq.*). Under settled Illinois practice, a respondent must elect to do one or the other. He cannot do both. (*People* v. *Wells*, 255 Ill. 450, 455, R. 58; *People* v.

Palmer, 363 Ill. 563, 571, R. 59; *People* v. *Lueders*, 287 Ill. 107, 109, R. 60). If he elects to raise an issue of law, he cannot frame issues of fact (*People* v. *Wells*, 255 Ill. 450, 455, R. 58; *People* v. *Palmer*, 356 Ill. 563, 571, R. 59). If he elects to raise an issue of fact he waives a demurrer (*People* v. *Lueders*, 287 Ill. 107, 109, R. 60) and the case is then remanded to a trial court or a Commissioner to determine the facts under a proper application of the law (*People* v. *Mayor of Alton*, 233 Ill. 542, 548). Upon respondents' motion (R. 54) this answer was treated as a demurrer (R. 69) because it sought to raise both issues of law and fact for the reasons assigned in the suggestions filed in support thereof, which are in the record here and need not be amplified (R. 57). Petitioner Petersen's own objections to the motion to treat his answer as a demurrer *agrees that it can be so treated* if the Supreme Court of Illinois would determine the case solely from subdivision II of the original petition for *mandamus* (R. 67) which dealt only with the record in the trial court (R. 9-34), which could not be disputed factually.

After the order had been entered Petersen's counsel wrote the Chief Justice of Illinois inquiring of the reasons impelling the court to grant the motion and the Chief Justice's reply (R. 73) advised him at the same time assuring him that the "issue will be determined solely upon the record, as presented to the trial court", that "obviously, any facts alleged, and not appearing in that record cannot be considered" (R. 73). The opinion of the Supreme Court discloses clearly that only the allegations of Petersen's complaint, admitted to be true, were considered by that court in determining whether the trial court had jurisdiction (R. 96).

Likewise petitioner Miner's answer violated Illinois practice in original *mandamus*. It did not traverse "by distinct and direct denial the facts alleged in the petition upon which the claim of relator is founded" (*People* v. *Lueders*,

287 Ill. 107, 109) nor did it "aver specifically the facts excusing" his conduct (*People* v. *Palmer*, 356 Ill. 563, 569). It merely neither admitted nor denied because of no knowledge sufficient to form a belief (R. 47) which, in legal effect is regarded as an admission that the facts of which lack of knowledge is averred are true (*People* v. *Crabb*, 156 Ill. 155, 165, R. 61, 62). Hence a special demurrer was filed to that answer (R. 67).

Thus the issues were closed upon the original petition for *mandamus*, Petersen's answer treated as a demurrer and the special demurrer to the answer of Miner (R. 69). Thus was presented a pure legal question, whether the facts alleged in Petersen's original complaint, admitting same to be true, brought his suit within the prohibition of the Illinois statute (Sec. 201 of Illinois Insurance Code, *ante* p. 4) prohibiting suits interfering with the prosecution of the business of an insurance company except upon the petition of the Director of Insurance. The Supreme Court of Illinois did not hold "as a matter of fact" that Petersen's suit was one interfering with the business of an insurance company. It held so as a matter of law upon the facts pleaded in his complaint in the trial court which were taken by it as true. Thus the issue was disposed of on demurrer and as agreed to by Petersen (R. 67). Is he thereby denied due process? As to petitioner Miner, how a Supreme Court can deprive one of its trial judges of due process is not readily apparent.

It is somewhat difficult to determine upon which basis petitioners claim to have been denied due process. It seems rather obvious that they disagree with the Illinois court's construction of its statute (Pet. 17, 18, 19) but they do not specifically say they were denied due process because the Illinois court disagreed with them on a matter involving purely local law. Obviously there would be no denial there (*Brinkerhoff-Faris Trust & Sav. Bk.* v.

Hill, 281 U. S. 673, 680, notes 6, 7, and cases cited). They begin the argument with the doctrine that this is a mere derivative suit by a shareholder (Pet. 14), ignoring the fact that it involves insurance. They ignore the right of a state to prescribe the remedy in matters impressed with a public interest. They cite no case holding that the legislature of Illinois, dealing with insurance, a subject impressed with a public interest, could not deprive a stockholder of an insurance corporation from his ordinary derivative action in equity without doing violence to the 14th Amendment. Necessity dictated this course because the authorities are all the other way. No person has any property, in the constitutional sense, in any particular remedy. "All that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure" (Roberts J. in *Gibbs* v. *Zimmerman*, 290 U. S. 326, 332; *Hardware Dealers Mut. F. Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *New York Central R. Co.* v. *White*, 243 U. S. 188, 207).

The Illinois statute is only one of many restricting a member or members of an insurance company from maintaining class or derivative suits interfering with the prosecution of the business of the company. These statutes broadly prohibit all suits interfering with the prosecution of the business of the company. The Illinois statute, like the others, does not refer specifically "only to actions against an insurance company," as petitioners claim (Pet. 19), but it refers to all suits "interfering with the prosecution of the business of any company," and as construed here, and by the other courts, these statutes apply not only to suits against the company but also against the officers or directors thereof; and, as so construed, they have been held valid by the state courts (see cases cited *infra*, p. 13).

Petitioners suggest that the Illinois Supreme Court issued its writ "upon assumptions of facts not before the

Court" and that therefore t "Court will review and correct errors of fact of a sta Supreme Court in assuming a state of facts, without support in the record" (Pet. 18). Obviously there is basis for the suggestion. The Illinois Supreme Court ld *as a matter of law,* admitting all the facts stated etersen's complaint, that his suit interfered with the p ecution of the Company's business within the meaning the Illinois statute and proscribed by it. Does it ta authority to support the view that a suit which seeks remove the officers and directors of a company interf with the prosecution of its business, not to mention th ancellation of the agency contract under which it procu all of its business or the other relief sought? The ma was disposed of on demurrer and Petersen agreed hat his Answer may be treated as a demurrer" if o the record in the Trial Court were considered (R. 67 nd only that record was considered. It is perfectly o us that the first opinion of the Illinois court was wro nd that a rehearing was necessary if the statute were be observed and its remedial provisions effectuated 83, 84). It is obvious that the first opinion overloo the fact that there was no object in trying the allegati of Petersen's complaint when they were admitted on th ecord.

Ample authority elsewhere pports Illinois' view of the object and purpose of its atute. (*Swan* v. *Mutual Reserve Fund Life Ins. Assn.* 5 N. Y. 9, 49 N. E. 258, 261, 262; *Lowry* v. *State Life* as. Co., 153 Ind. 101, 54 N. E. 442, 443, 444; *Oklahoma* nefit Life Assn. v. *Bird,* (Okla.) 135 Pac. (2d) 994, 99 1943); *Baird* v. *Modern Samaritan,* 162 Minn. 274, 202 W. 498, 499; *Delaney* v. *Ancient Order of United Work* 244 Mass. 556, 138 N. E. 918; *Cook* v. *Illinois Bankers L* Assn., 46 F. (2d) 782, 783 (C.C.A. 7 *McGarry* v. *Lentz* F. (2d) 51, 52 (C.C.A. 6).) Oklahoma issued its ori l writ of prohibition to prevent a similar attempt to ci nvent its law (*Oklahoma*

Benefit Life Assn. v. *Bird,* (Okla.) 135 Pac. (2d) 994, 997 (1943)). Minnesota spoke realistically of the *rationale* behind its similar statute (Sec. 3482, G. S. 1923) in *Baird* v. *Modern Samaritan,* 162 Minn. 274, 202 N. W. 498:

> "Unless dissatisfied members of a fraternal insurance association are able to induce either the insurance commissioner or the Attorney General to move to rectify the conduct of the association or its governing body as to its business or methods, we think they can have no redress through the courts. Good reasons readily suggest themselves for the enactment of section 3482. In associations of this sort every one insured is a member. *If any dissatisfied or disgruntled member on his own motion may drag the association and its governing body into court as to the conduct of its business or methods of procedure, its usefulness will be seriously impaired and its very existence endangered. The mere fact that an action is brought affects the standing of such an association without regard to whether or not any basis exists for so doing.*" (Italics ours.)

Mr. Chief Justice Rugg in *Delaney* v. *Ancient Order of United Workmen,* 244 Mass. 566, 138 N. E. 918, said that the effect of the similar Massachusetts statute was "not to cut off substantial rights, but to provide orderly methods of redressing genuine grievances" and thereby prevent

> "hostile attacks upon an institution in which large numbers of persons are interested, except through the instrumentality of a public officer and to render impossible the harm which might come to a solvent and worthy beneficiary corporation insuring great numbers of people through ill-considered proceedings."

The leading case on this subject is the one mentioned by the Illinois Supreme Court in its Opinion (R. 97) *Swan* v. *Mutual Reserve Fund Life Ins. Assn.,* 155 N. Y. 9, 49 N. E. 258, 261, 262, an opinion by Mr. Justice John Chipman Gray. He spoke of these suits as "suits interfering with the management of corporate affairs, and which might

produce hopeless confusion, and might impair the efficiency of the company, if not wreck it'' (49 N. E. 258, 261).

C.

Petitioner Petersen has failed to exhaust his administrative remedy.

It is, of course, elemental that the business of insurance is impressed with the public interest and therefore subject to the police power of the state. (*German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 406 *et seq.; National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, 73; *People* v. *Palmer,* 363 Ill. 499, 508; *Swan* v. *Mut. Reserve Life Ins. Assn.,* 155 N. Y. 9, 49 N. E. 258, 261, 262.) In the exercise of such police power Illinois has and has had for considerable time extensive and exhaustive laws covering the field of insurance (Ill. Rev. Stats (1941 Par. 613, *et seq.*) Ch. 73). Let us first consider the public policy of Illinois as enunciated in its Insurance Code. The Code is a comprehensive one, dealing with insurance companies from their organization to dissolution in all of their important relations either with the state or its citizens. The Director of Insurance is a statutory officer, clothed with all essential authority and power enabling him effectively to enforce the laws governing insurance companies, their directors, officers and agents. A brief examination of the Code shows that the legislature has gone very far under its police power to make certain that insurance companies, domestic, foreign or alien, are properly managed, solvent and fair in their dealings with the public.

The corporate powers of domestic mutual insurance companies such as the Petitioner Association are regulated by Article III of the Code, Section 36, *et seq.* (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 648, *et seq.*). Subsection 2 of Section 40 provides that the corporate powers shall be

exercised by a board of directors which shall have control of its business and affairs. Section 441 contains other general provisions dealing with its general corporate powers (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 1053). Section 142 requires all amendments of the by-laws to be delivered to the Director within thirty days of adoption (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 754). Section 57 (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 669) requires all amendments of the articles of incorporation to be submitted to the Director for his approval. These sections, coupled with subdivision (f) of Section 188 (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 800) referring to rehabilitation and liquidation, give the Director complete power to compel compliance with the law of Illinois as respects the corporate set-up of any company.

There are various other important provisions dealing with such a company as a going concern. Sections 125, 128 and 129 prescribe the investments of such companies (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 737, 740, 741). Section 53 requires deposit of securities with the state for the protection of the policyholders and creditors (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 665). Section 60 provides the procedure to be followed if the company suffers serious impairment of its assets (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 672). Section 136 requires detailed sworn annual financial statements in order that the Director may determine whether the company is entitled to continue in business (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 748). Sections 187, *et seq.* deal with the method of rehabilitation in case the company is in financial difficulty (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 799). Section 156 provides the method by which a company may merge or consolidate with another company (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 768). Section 173 provides the method by which it may reinsure its risks with other companies (Smith-Hurd Ill.

Rev. Stats. (1941) Ch. 73, Par. 785). Section 144 limits the maximum size of a risk which may be underwritten (Smith-Hurd Ill. Rev. States. (1941) Ch. 73, Par. 756). All of these provisions have to do with the financial solvency of a company.

Section 143, Sections 224, *et seq.* and Sections 355, *et seq.* deal with the forms of policies which may be sold by such companies to the public (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 755, 836 *et seq.* and 967 *et seq.*). All are required to be approved by the Director before issuance. Section 148 prohibits false advertisements of the financial condition of a company and Section 149 prohibits misrepresentation as to policy contracts (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 760, 761). The Act approved June 21, 1936, as amended by the Act of July 17, 1941, requires annual licensing by the state of all agents, brokers, solicitors and company service representatives of any such company (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 587 *et seq.*).

In order that the Director may be able to enforce these various provisions, broad powers have been granted him to examine into the books, records and transactions of such companies, including examination of persons having contracts as exclusive general agents. Subsection 1, subdivision (d) of Section 132, Sections 401, 402 and 403, charge the Director with the enforcement of the insurance laws and give him full power so to do. He may conduct such examinations, investigations and hearings as are necessary and proper in the administration of the law. He may appoint deputies and examiners to assist him. He has power to subpoena and examine witnesses (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 1013, *et seq.*). Section 407 (Appendix, *infra*, p. 23) provides that any person having a proper interest, and aggrieved by his action or failure to act, has the right to appeal to the courts for review (Smith-

Hurd Ill. Rev. Stats. (1941) Par. 1019). Section 188 provides the judicial procedure to be followed by the Director in case a company is insolvent, violates the law, is hazardous in its operations, or fails to comply with the lawful orders of the Director (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 800). In such case, he shall report the matter to the Attorney General whose duty it shall be to forthwith apply by petition in the name of the Director to the appropriate circuit or superior court to show cause why the company should not be liquidated or rehabilitated or for such other relief as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require. One of the grounds for such action is (f) *Violation of its charter or any law of this state, or exceeding its corporate powers.* If any company has made a contract in violation of either its charter or the laws of this state, the Director has full authority to make such investigation as he sees fit and to take such legal action in the courts as he thinks appropriate to remedy the evil complained of.

This brings us to a consideration of Section 201. Having in mind that the legislature by the foregoing has laid down the essential conditions governing the companies and has made it the duty of the Diretcor to proceed to correct evils where they exist, it is patent that Section 201 was intended to prevent suits of the kind at bar. We submit that it was intended to protect companies against annoying suits in the courts by policyholders or others as well as to make the Director secure in his administration of the law. If each individual policyholder is to be permitted to bring suits covering matters expressly within the jurisdiction and control of the Director, then, what is the point in enacting detailed regulatory laws and giving the Director authority to enforce them? This legislation, now in force in other states as well as Illinois, is meaningless unless its purpose is to vest in the Director sole author-

ity and power to remedy defects and weaknesses in insurance companies or violations of the law by them. The legislation in no way violates any constitutional right of a policyholder, nor does it impair the obligation of his contract of insurance as the cases hereinbefore referred to clearly demonstrate, but merely furnishes a remedy, an orderly method of procedure, by which that remedy may be applicable to every person situated as is Petitioner Petersen in the case at bar.

The leading case is *Swan* v. *Mutual Reserve Life Ins. Assn.*, 155 N. Y. 9, 49 N. E. 258, written by Mr. Justice John Chipman Gray. In speaking of the New York statute limiting suits, substantially identical with ours, the Court said:

> "The effect of the legislation was not to cut off the rights of a party, but merely to prescribe the form of the remedy which he must avail himself of in the pursuit of his object to compel the corporation to perform acts or to account as to matters in respect of which it may be alleged to have been neglectful or wasteful or mistaken,"

reference being had to application to the Insurance Director.

The Court specifically referred to the fact that the affairs of insurance corporations were peculiarly taken within the care and supervision of the State and that the enactment was within the sound discretion of the legislature "of the possibility of suits interfering with the management of the corporate affairs, and which might produce hopeless confusion, and might impair the efficiency of the company, if not wreck it." This was so because there was a reason for making a distinction "between such insurance companies and other corporations, for the former have characteristics which entitle them to be regarded as almost public in their nature," entirely "unlike private corpora-

tions organized purely for the pecuniary profit of their members."

The learned Justice continued that if his views were not correct, then insurance corporations "chartered by the state as they are for the common benefit of those who wish to cooperate in the business of life insurance, are at the mercy of any member who, with unworthy or dishonest motives, chooses to attack them, and, by threatened interference with their methods or management may compel them to make a settlement with him in order to secure, * * * freedom from troublesome, expensive, unnecessary and wholly disingenuous investigation into affairs and accounts running through many years."

Or as the Supreme Court of Oklahoma, in awarding its original writ of prohibition in a similar case, wherein it was sought to remove the officers of an insurance company, said (*Oklahoma Benefit Life Assn., et al* v. *Baird, et al.*, 135 Pac. (2d) 994:

> "Nor may they (members) resort to the courts for determination whether *the association or its officers* has acted *ultra vires* or *transgressed the law in any way.* The Insurance Commissioner alone may prosecute such cases. He is the executive officer designated for that purpose."
>
> "To so confine legal action to the Insurance Commissioner *has long been considered* as the better plan to preserve and protect the interests of members or policyholders. Insurance companies have come to be looked upon as at least quasi-public in nature, subject to state control for the general benefit of not only the policyholders but of the public." (Italics ours.)

To the same effect are the other foreign cases cited by us under statutes similar to ours.

Petitioner Petersen does not in his complaint allege that he applied to the Director of Insurance to remedy the al-

leged evils of which he complains. The Supreme Court of Illinois, in its opinion here, points out that such remedy is available to him (R. 98). We have seen that constitutionally no one is entitled to a particudar remedy. It is sufficient that an adequate remedy be accorded. It would seem rather obvious that the Insurance Code provides him with an adequate remedy by

(a) Application to the Director to remedy the evils of which he complains, the Director having ample powers under the Code;

(b) Judicial review under Section 407 of the Code (App. *infra*, p. 23) in the event of the failure or refusal of the Director to act.

It is elemental "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (Brandeis J., in *Meyers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41, 50, 51, Note 9, and cases cited.)

CONCLUSION.

For the reason indicated, we therefore respectfully submit that the Petition herein be denied.

Respectfully submitted,

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(Appendix follows)